

SENATE BILL NO. 83

INTRODUCED BY B. MCCARTHY

BY REQUEST OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

A BILL FOR AN ACT ENTITLED: "AN ACT GIVING THE DEPARTMENT OF ENVIRONMENTAL QUALITY DISCRETION TO ASSESS ADMINISTRATIVE PENALTIES FOR WATER QUALITY ACT VIOLATIONS THAT HAVE BEEN CORRECTED; REVISING THE ADMINISTRATIVE PENALTY PROCEDURES FOR CERTAIN ACTS ADMINISTERED BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY; REVISING DEPARTMENT AUTHORITY TO ASSESS ADMINISTRATIVE OR CIVIL PENALTIES FOR VIOLATIONS OF THE COAL, URANIUM, METAL, AND OPENCUT MINE RECLAMATION LAWS; AMENDING SECTIONS 75-5-611, 75-5-621, 82-4-254, 82-4-361, AND 82-4-441, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-5-611, MCA, is amended to read:

"75-5-611. Violation of chapter -- administrative actions and penalties -- notice and hearing. (1)

When the department has reason to believe that a violation of this chapter, a rule adopted under this chapter, or a condition of a permit or authorization required by a rule adopted under this chapter has occurred, it may have a written ~~notice~~ violation letter served personally or by certified mail on the alleged violator or the alleged violator's agent. The ~~notice~~ violation letter must state:

(a) the provision of statute, rule, permit, or approval alleged to be violated;

(b) the facts alleged to constitute the violation;

(c) the specific nature of corrective action that the department requires; and

~~(d) as applicable, the amount of the administrative penalty that will be assessed by order under subsection (2) if the corrective action is not taken within the time provided under subsection (1)(e); and~~
~~———— (e)(d) as applicable, the time within which the corrective action is to be taken or the administrative penalty will be assessed.~~

(2) For the purposes of this chapter, service by certified mail is complete on the date of mailing. ~~receipt. Except as provided in subsection (2)(a)(ii), an administrative penalty may not be assessed until the~~

1 ~~provisions of subsection (1) have been complied with.~~

2 ~~(2)(3)~~ (a) When the department has reason to believe that a violation of this chapter, a rule
3 adopted under this chapter, or a condition of a permit or authorization required by a rule adopted under
4 this chapter has occurred, the ~~The~~ department may issue an administrative notice and order requiring
5 corrective action and assessing an administrative penalty. ~~in lieu of the notice letter provided under~~
6 ~~subsection (1) if the department's action:~~

7 ~~—— (i) does not involve assessment of an administrative penalty; or~~

8 ~~—— (ii) seeks an administrative penalty only for an activity that it believes and alleges has violated or~~
9 ~~is violating 75-5-605.~~

10 (b) The department may not issue a notice and order under this subsection (3) until the department
11 has issued a violation letter that meets the requirements of subsection (1). A violation letter is not required
12 if the alleged violation represents an imminent threat to human health, safety, or welfare or the
13 environment. A notice and order issued under this ~~section~~ subsection (3) must meet all of the
14 requirements specified for a violation letter in subsection (1).

15 ~~(3)(4)~~ (4) In a notice and order given under subsection ~~(1)~~ (3), the department may require the alleged
16 violator to appear before the board for a public hearing and to answer the charges. The hearing must be
17 held no sooner than 15 days after service of the notice and order, except that the board may set an earlier
18 date for hearing if it is requested to do so by the alleged violator. The board may set a later date for
19 hearing at the request of the alleged violator if the alleged violator shows good cause for delay.

20 ~~(4)(5)~~ (5) If the department does not require an alleged violator to appear before the board for a public
21 hearing, the alleged violator may request the board to conduct the hearing. The request must be in writing
22 and must be filed with the department no later than 30 days after service of a notice and order under
23 subsection ~~(2)~~ (3). If a request is filed, a hearing must be held within a reasonable time. If a hearing is not
24 requested within 30 days after service upon the alleged violator, the opportunity for a contested case
25 appeal to the board under Title 2, chapter 4, part 6, is waived.

26 ~~(5)(6)~~ (6) If a contested case hearing is held under this section, it must be public and must be held
27 in the county in which the violation is alleged to have occurred or in Lewis and Clark County.

28 ~~(6)(7)~~ (a) After a hearing, the board shall make findings and conclusions that explain its decision.

29 (b) If the board determines that a violation has occurred, it shall also issue an appropriate order
30 for the prevention, abatement, or control of pollution, the assessment of administrative penalties, or both.

(c) If the order requires abatement or control of pollution, the board shall state the date or dates by which a violation must cease and may prescribe timetables for necessary action in preventing, abating, or controlling the pollution.

(d) If the order requires payment of an administrative penalty, the board shall explain how it determined the amount of the administrative penalty.

(e) If the board determines that a violation has not occurred, it shall declare the department's notice void.

~~(7)(8)~~ The alleged violator may petition the board for a rehearing on the basis of new evidence, which petition the board may grant for good cause shown. The board may grant the petition if good cause is shown.

~~(8)(9)~~ Instead of issuing an order, the board may direct the department to initiate appropriate action for recovery of a penalty under 75-5-631, 75-5-632, 75-5-633, or 75-5-635.

~~(9)(10)~~ (a) An action initiated under this section may include an administrative penalty of not more than \$10,000 for each day of each violation; ~~however,~~ However, the maximum penalty may not exceed \$100,000 for any related series of violations.

(b) Administrative penalties collected under this section must be deposited in the general fund.

(c) In determining the amount of penalty to be assessed to a person, the department and board shall consider the criteria stated in 75-5-631(4) and rules promulgated under 75-5-201.

~~(10)(11)~~ The contested case provisions of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6, apply to a hearing conducted under this section."

Section 2. Section 75-5-621, MCA, is amended to read:

"75-5-621. Emergencies. (1) Notwithstanding other provisions of this chapter, if the department finds that a person is committing or is about to commit an act in violation of this chapter or an order or rule issued under this chapter that, if it occurs or continues, will cause substantial pollution, the harmful effects of which will not be remedied immediately after the commission or cessation of the act, the department may order the person to stop, avoid, or moderate the act so that the substantial injury will not occur. The order is effective immediately upon receipt by the person to whom it is directed, unless the department provides otherwise.

(2) Notice of the order must conform to the requirements ~~of~~ for a violation letter provided in

1 75-5-611(1) so far as practicable. The notice must indicate that the order is an emergency order.

2 (3) Upon issuing an order, the department shall fix a place and time for a hearing before the board,
3 not later than 5 days after issuing the order unless the person to whom the order is directed requests a
4 later time. The department may deny a request for a later time if it finds that the person to whom the order
5 is directed is not complying with the order. The hearing must be conducted in the manner specified in
6 75-5-611. As soon as practicable after the hearing, the board shall affirm, modify, or set aside the order
7 of the department. The order of the board must be accompanied by the information required in
8 75-5-611~~(6)~~(7). An action for review of the order of the board may be initiated in the manner specified
9 in 75-5-641. The initiation of an action or taking of an appeal may not stay the effectiveness of the order
10 unless the court finds that the board did not have reasonable cause to issue an order under this section."

11

12 NEW SECTION. **Section 3. Administrative penalty order.** (1) If the department believes that a
13 violation has occurred, it may issue a notice of violation and administrative penalty order, which requires
14 the payment of an administrative penalty consistent with the requirements of [section 4]. The penalty
15 order must:

16 (a) state with reasonable specificity the provision of this part, rule, order, permit provision, or other
17 requirement alleged to have been violated;

18 (b) describe the facts alleged to constitute a violation; and

19 (c) notify the recipient of the opportunity to request a hearing before the board.

20 (2) The department shall serve a penalty order under this section personally or by certified mail
21 on the alleged violator or the alleged violator's agent. Service by mail is complete on the date of mailing.

22 (3) The department may vacate an order issued under this section if it determines that a violation
23 did not occur. The department may modify an order if it determines that modification is appropriate
24 because of new information or further consideration of the factors set forth in [section 4(4)]. The
25 department may terminate an order if it determines that the order is no longer necessary.

26 (4) Action under this section does not bar enforcement of this part by injunction or other
27 appropriate remedy.

28 (5) A person who has been served with an order or a modification of an order under this section
29 may, within 30 days after service, request a hearing before the board. The request for hearing must state
30 the reason for the request. The filing of a request for hearing stays the order. The contested case

provisions of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6, apply to a hearing conducted under this section.

(6) If the person who has been served an order under this section does not file a request for hearing pursuant to subsection (5), the department may file the order with the district court of any county. Upon request of the department, which may be ex parte, the district court shall review and approve the order unless defects appear on the face of the order. An approved order has all the force, effect, and attributes of a docketed judgment, order, or decree of the district court, including but not limited to lien effect and enforceability by supplemental proceedings.

NEW SECTION. Section 4. Administrative penalty order -- calculation of penalty amount. (1) An administrative penalty order issued pursuant to [section 3] must require the payment of an administrative penalty that is consistent with the requirements of this part. Each day of each violation constitutes a separate violation.

(2) Except as provided in subsection (3), a penalty may not be assessed for a day of violation that occurred more than 3 years prior to the issuance of an order by the department under [section 3].

(3) A penalty may be assessed for days of violation that occurred more than 3 years prior to the issuance of an order by the department under [section 3] if before, during, or after the violation, the violator took action or failed to take action with the intent to prevent the department from discovering the violation.

(4) The amount of penalty to be assessed for a violation may not be more than the maximum penalty prescribed by this part and must be derived considering:

(a) the nature of the violation, including the degree of harm to the public health, safety, or welfare or the environment, and the importance of maintaining compliance to the integrity of the regulatory scheme;

(b) the extent and duration of the violation;

(c) the economic benefit of noncompliance;

(d) the size of the violator and the violator's ability to pay;

(e) the violator's compliance history;

(f) the circumstances of the violation, including the violator's good faith efforts to comply and degree of willfulness; and

(g) other matters that justice may require.

Section 5. Section 82-4-254, MCA, is amended to read:

"82-4-254. Violation -- penalty --waiver. (1) ~~Except as provided in subsection (2), a~~ A person or operator who violates ~~any of~~ the provisions of this part, rules or orders adopted under this part, or a term or condition of a permit and ~~any a~~ director, officer, or agent of a corporation who willfully authorizes, orders, or carries out a violation shall pay ~~a~~ an administrative or civil penalty of not less than \$100 or more than \$5,000 for the violation and an additional administrative or civil penalty of not less than \$100 or more than \$5,000 for each day during which a violation continues and may be enjoined from continuing the violations as provided in this section. ~~Any~~ A person or operator who fails to correct a violation within the period permitted by law, rule of the board, or order of the department shall be assessed ~~a~~ an administrative or civil penalty of not less than \$750 for each day, up to 30 days, during which the failure or violation continues. ~~The period permitted for correction of a violation does not, in the case of any review proceeding under 82-4-251(6), end until entry of a final order suspending the abatement requirements or until entry of an order of court ordering suspension of the abatement requirements. If the failure to abate continues for more than 30 days, the department shall, within 30 days after the 30-day period, take appropriate action pursuant to 82-4-251(3) or request action under subsection (4) or (6) of this section.~~

~~———(2) The department may waive the civil penalty for a minor violation of this part, a rule or order adopted under this part, or a term or condition of a permit if the department determines that the violation is not of potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection.~~

~~———(3) The department shall notify the person or operator of the violation. By filing a written request within 20 days of receipt of the notice of violation, the person or operator is entitled to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be assessed is proper. The department shall issue a statement of proposed penalty no more than 10 days after notice of violation. After the hearing or after the time for requesting a hearing has expired, the department shall make findings of fact and shall issue a written decision as to the occurrence of the violation and the amount of penalty warranted and shall order the payment of a penalty in that amount. The person or operator shall remit the amount of the penalty within 30 days of the order. If the person or operator wishes~~

~~to obtain judicial review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is being paid under protest and the department shall hold the payment in escrow until judicial review is complete. Any person or operator who fails to request and submit testimony at the hearing provided for in this subsection or who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in any action brought in the name of the state of Montana by the attorney general in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or the district having jurisdiction over the defendant.~~

(2) An action initiated under [sections 3 and 4] for a violation of the provisions of this part, rules or orders adopted under this part, or a term or condition of a permit may include an administrative penalty as provided for in this section.

~~(4)~~(3) The attorney general shall, upon request of the director of environmental quality, sue for the recovery of the civil penalties provided for in this section and bring an action for a restraining order or a temporary or permanent injunction against an operator or other person who:

(a) violates, threatens to violate, or fails or refuses to comply with ~~any~~ an order or decision issued under this part;

(b) interferes with, hinders, or delays the department in carrying out the provisions of this part;

(c) refuses to admit an authorized representative of the department to the permit area;

(d) refuses to permit inspection of the permit area by an authorized representative of the department;

(e) refuses to furnish ~~any~~ information or a report requested by the department in furtherance of the provisions of this part;

(f) refuses to permit access to and copying of records that the department determines to be necessary in carrying out the provisions of this part.

~~(5)~~(4) ~~Any relief~~ Relief granted by a court under subsection ~~(4)(a)~~ (3)(a) continues in effect until the completion or final termination of all proceedings for review of relief granted under this part unless, prior to the final determination, the district court granting the relief sets it aside or modifies it.

~~(6)~~(5) A person who violates ~~any of~~ the provisions of this part or ~~any~~ a determination or order adopted under this part or who willfully violates ~~any~~ a permit condition issued under this part is guilty of a misdemeanor and shall be fined not less than \$500 and not more than \$10,000 or imprisoned for not

1 more than 1 year, or both. Each day ~~on which the~~ of violation ~~occurs~~ constitutes a separate offense.

2 ~~(7)(6)~~ (7)(6) Any A person who knowingly makes ~~any~~ a false statement, representation, or certification
3 or knowingly fails to make ~~any~~ a statement, representation, or certification in ~~any~~ an application, record,
4 report, plan, or other document filed or required to be maintained pursuant to this part shall upon
5 conviction be punished by a fine of not more than \$10,000 or by imprisonment for not more than 1 year,
6 or both.

7 ~~(8)(7)~~ (8)(7) Any A person who except as permitted by law willfully resists, prevents, impedes, or
8 interferes with the department or its agents in the performance of duties pursuant to this part shall be
9 punished by a fine of not more than \$5,000 or by imprisonment for not more than 1 year, or both.

10 ~~(9)(8)~~ (9)(8) An employee of the department performing ~~any~~ a function or duty under this part may not
11 have a direct or indirect financial interest in ~~any~~ a strip- or underground-coal-mining operation. A person
12 who knowingly violates the provisions of this subsection shall upon conviction be punished by a fine of
13 not more than \$2,500 or by imprisonment of not more than 1 year, or both."

14

15 **Section 6.** Section 82-4-361, MCA, is amended to read:

16 **"82-4-361. Violation -- penalties -- waiver.** (1) (a) The department may ~~assess~~ initiate an action
17 under [sections 3 and 4] or this section that seeks an administrative or civil penalty of not less than \$100
18 or more than \$1,000 for each of the following violations and an additional administrative or civil penalty
19 of not less than \$100 or more than \$1,000 for each day during which the violation continues, and the
20 department may bring an action for an injunction from continuing the violation against:

21 (i) a person or operator who violates a provision of this part, a rule or order adopted under this
22 part, or a term or condition of a permit; or

23 (ii) ~~any~~ a director, officer, or agent of a corporation who willfully authorizes, orders, or carries out
24 a violation of a provision of this part, a rule or order adopted under this part, or a term or condition of a
25 permit.

26 (b) If the violation created an imminent danger to the health or safety of the public or caused
27 significant environmental harm, the maximum penalty is \$5,000 for each day of violation.

28 (2) The department may bring a civil action for recovery of the civil penalties provided for in this
29 section. ~~shall take into account the following factors in determining whether to institute a civil penalty~~
30 ~~action and in determining the penalty amount:~~

- 1 ~~—— (a) the nature, circumstances, extent, and gravity of the violation;~~
2 ~~—— (b) the violator's prior history of violations;~~
3 ~~—— (c) the economic benefit or savings, if any, to the violator resulting from the violator's action;~~
4 ~~—— (d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts~~
5 ~~of the violation; and~~
6 ~~—— (e) other matters that justice may require.~~

7 (3) The department may bring an action for a restraining order or a temporary or permanent
8 injunction against an operator or other person violating or threatening to violate an order adopted under
9 this part.

10 ~~(4) The department shall notify the person or operator of the violation. The department shall issue~~
11 ~~a statement of proposed penalty within 30 days after notice of the violation. The person or operator, by~~
12 ~~filing a written request within 20 days of receipt of the notice of proposed penalty, is entitled to a hearing~~
13 ~~on the issues of whether the alleged violation has occurred and whether the penalty proposed to be~~
14 ~~assessed is proper. After the hearing or after the time for requesting a hearing has expired, the department~~
15 ~~shall make findings of fact and issue a written decision as to the occurrence of the violation and whether~~
16 ~~the amount of penalty is warranted. The department shall order the payment of a penalty in that amount.~~
17 ~~The person or operator shall remit the amount of the penalty or petition for judicial review within 30 days~~
18 ~~of receipt of the order. A person or operator who fails to request the hearing provided for in this subsection~~
19 ~~or who fails to petition for judicial review within 30 days of receipt of the order forfeits that person's or~~
20 ~~operator's right to seek judicial review of the violation or penalty determinations. These penalties are~~
21 ~~recoverable in an action brought by the department.~~

22 ~~(5)(4)~~ Legal Civil actions for injunctive relief under this section must be brought in the district court
23 of the county in which the alleged violation occurred or, if mutually agreed to by the parties to the action,
24 in any other judicial district. Legal Civil actions for ~~review of penalty orders or for~~ recovery of penalties
25 must be brought in the district court in the first judicial district, Lewis and Clark County."

26

27 **Section 7.** Section 82-4-441, MCA, is amended to read:

28 **"82-4-441. Penalty -- enforcement Violation -- penalty.** (1) The department may initiate an action
29 under [sections 3 and 4] or this section ~~assess~~ against a person who violates ~~any~~ of the provisions of this
30 part, rules adopted under this part, or provisions of a reclamation permit:

1 (a) seeking an administrative or a civil penalty of not less than \$100 or more than \$1,000 for the
2 violation; and

3 (b) seeking an additional administrative or civil penalty of not less than \$100 or more than \$1,000
4 for each day during which a violation continues following the service of notice of the violation.

5 (2) The department may bring a civil action for recovery of the civil penalties provided for in this
6 section. The action for recovery of penalties must be brought in the district court in the first judicial
7 district, Lewis and Clark County. shall take into account the following factors in determining whether to
8 institute a civil penalty action and in determining the penalty amount:

9 ~~—— (a) the nature, circumstances, extent, and gravity of the violation;~~

10 ~~—— (b) the violator's prior history of violations;~~

11 ~~—— (c) the economic benefit or savings, if any, to the violator resulting from the violator's action;~~

12 ~~—— (d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts~~
13 ~~of the violation; and~~

14 ~~—— (e) other matters that justice may require.~~

15 (3) ~~The department shall notify the person or operator of the violation. The person or operator is~~
16 ~~entitled, by filing a written request within 20 days of receipt of the notice of violation, to a hearing on the~~
17 ~~issues of whether the alleged violation has occurred and whether the penalty proposed to be imposed is~~
18 ~~proper. The department shall issue a statement of proposed penalty no more than 10 days after notice of~~
19 ~~violation. After the hearing or after the time for requesting a hearing has expired, the department shall~~
20 ~~make findings of fact, issue a written decision as to the occurrence of the violation and the amount of~~
21 ~~penalty warranted, and order the payment of a penalty in that amount. The person or operator shall remit~~
22 ~~the amount of the penalty within 30 days of the order. If the person or operator wishes to obtain judicial~~
23 ~~review of the assessment, the person or operator shall submit with the penalty a statement that the~~
24 ~~penalty is being paid under protest and the department shall hold the payment in escrow until judicial~~
25 ~~review is complete. A person or operator who fails to request and submit testimony at the hearing provided~~
26 ~~for in this subsection or who fails to pay the assessed penalty under protest within 30 days of the order~~
27 ~~assessing the penalty forfeits the right to seek judicial review of the violation or penalty determinations.~~
28 ~~These penalties are recoverable in an action brought by the department in the district court of the first~~
29 ~~judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county~~
30 ~~in which the opencut mine is located.~~

~~(4)~~(3) The department may bring an action to enjoin an operator or other person violating or threatening to violate this part, rules adopted pursuant to this part, or a permit pursuant to this part in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the opencut mine is located."

NEW SECTION. **Section 8. Codification instruction.** [Sections 3 and 4] are intended to be codified as an integral part of Title 82, chapter 4, part 2; Title 82, chapter 4, part 3; and Title 82, chapter 4, part 4; and the provisions of Title 82, chapter 4, part 2, Title 82, chapter 4, part 3; and Title 82, chapter 4, part 4, apply to [sections 3 and 4].

NEW SECTION. **Section 9. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 10. Effective date.** [This act] is effective on passage and approval.

- END -